

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod
Administrative Law Judge

Case No. 13-ALJ-17-0218-CC
Tracking No.: 2014-000214

Eugenia Boggero, d/b/a Boggero's Portable Toilets,.....Appellant,

v.

South Carolina Department of Revenue,.....Respondent.

RESPONDENT'S MOTION TO DISMISS APPEAL WITH PREJUDICE

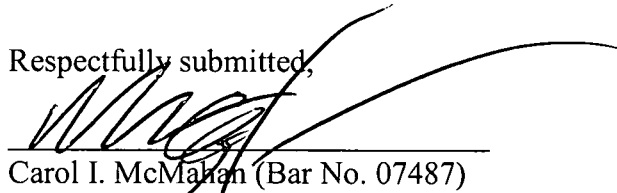
COMES NOW the Respondent, South Carolina Department of Revenue, and pursuant to Rule 240, SCACR, respectfully requests that this Court dismiss this appeal with prejudice. As more thoroughly discussed in the Memorandum and Affidavit attached to this Motion, Appellant failed to pay or post bond for the tax found to be due by the Administrative Law Court prior to the appeal of this case as required by S.C. Code Ann. Section 12-60-3370 (2014). Accordingly, such appeal should be dismissed with prejudice.

Wherefore Respondent respectfully requests this Court dismiss this appeal with prejudice and such other and further relief as this Court deems appropriate.

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Respectfully submitted,



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South Carolina Department of Revenue,.....Respondent.

**MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS
THIS APPEAL WITH PREJUDICE**

On March 28, 2014, the Respondent, South Carolina Department of Revenue filed with this Court and served on counsel of record, its Motion to Dismiss Appeal With Prejudice. The Respondent submits that due to Appellant's failure to pay the tax found to be due by the Administrative Law Court (ALC) prior to her appeal to this Court, such failure divests this Court of appellate jurisdiction and requires dismissal of the instant appeal.

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ISSUE

Should this appeal be dismissed because Appellant failed to comply with the requirements of S.C. Code Ann. § 12-60-3370 (2014) by failing to pay the tax or post bond for same prior to appealing the matter to the Court of Appeals?

RELEVANT FACTS

On January 6, 2014, the Administrative Law Court (ALC) issued its Final Order and Decision (Order) giving rise to the issue herein. In the Order the ALC determined that Appellant owed sales tax (including penalties and interest thereon).¹ (Exhibit A) On February 3, 2014, Appellant filed its Notice of Appeal with the Court of Appeals (Appellant's Initial Brief p. 3). Appellant received the ALC Order by electronic mail on January 6, 2014 (Appellant Notice of Appeal dated February 3, 2014). Appellant paid the tax (but did not pay the interest thereon) determined to be due by the ALC on February 27, 2014. (Exhibit B and Exhibit C).²

ARGUMENT IN SUPPORT OF DISMISSAL

Because Appellant failed to pay the tax determined to be due by the ALC (or post bond for same) prior to the appeal filed with the Court of Appeals (Court) in this matter,

¹The ALC imposed the sales tax pursuant to S.C. Code Ann. § 12-36-910 (Supp. 2009) (Order, Exhibit I, p. 4, 7, and 15). Such is a tax as defined S.C. Code Ann. § 12-60-30 (27) (2009, 2014) as:

“Tax” or “taxes” means taxes, licenses, permits, fees, or other amounts, including interest, regulatory and other penalties, and civil fines, imposed by this title, or subject to assessment or collection by the department.

²Appellant paid the tax outside the thirty day period for appeal of the ALC Order. § 1-23-610, Rule 203(b)(6), SCACR. (She also failed to pay any interest which is part of the tax, Id.)

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this Court lacks appellate jurisdiction. See State v. Brown, 358 S.C. 382, 596 S.E. 2d 39 (2004).

The Administrative Procedures Act (APA) provides for the appeal of an ALC decision. S.C. Code Ann. Section 1-23-610 (a) (Supp. 2013) provides:

(A)(1) For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.

S.C. Code Ann. Section 12-60-3370 (2014) also provides with regard to appeals where taxes have been determined to be due by the ALC in relevant part:

Except as otherwise provided, a taxpayer shall pay, or post a bond for, all taxes, not including penalties or civil fines, determined to be due by the administrative law judge **before appealing the decision to the court of appeals.**

(Emphasis added).

S.C. Code Ann. Section 12-60-3380 provides:

Appeal of decision to court of appeals.

Except as otherwise provided in this chapter, a party may appeal a decision of the Administrative law Court to the court of appeals. Appeal of a decision of the Administrative Law Court must be made in accordance with Section 1-23-610(B).

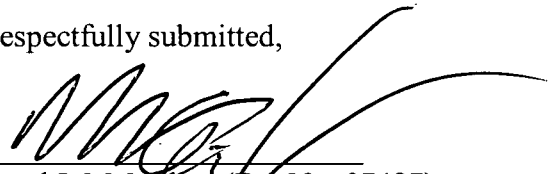
In State v. Brown, 358 S.C. 382, 384,³ the South Carolina Supreme Court stated:

³Although not precedent, in an unpublished decision Anonymouse Taxpayer v. S.C. Dept. of Revenue, 2008-UP-124, this Court citing State v. Brown, Id. found that it lacked appellate jurisdiction in the matter because the Appellant had failed to pay the tax

The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of “appellate” jurisdiction over the case, but it does not affect the court’s subject matter jurisdiction. (emphasis supplied) (internal citations omitted). Great Games, 529 S.E.2d at 8 n. 5.

Here, Appellant paid the tax imposed by the ALC Order after filing the Notice of Appeal with this Court. The tax was paid after the time had passed for filing the Notice of Appeal (appeal filed on February 4, 2014 and the tax was not paid until February 27, 2014). Here, Appellant failed to pay such tax prior to the appeal of the ALC Order. Accordingly, Respondent submits this Court lacks appellate jurisdiction in this matter and respectfully requests the appeal be dismissed with prejudice.

Respectfully submitted,



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prior to the appeal to the circuit court pursuant to Section 12-60-3370. At the time the taxpayer appealed the ALC decision in Anonymous such appeals were taken to the circuit court pursuant to the then existing Sections 12-60-3370 and 1-23-610. In 2006, both of these sections as well as Section 12-60-3380 were amended to provide for appeals from ALC decisions to the Court of Appeals. See 2006 Act No. 387, § 5, eff July 1, 2006 (amending 1-23-610); 2006 Act No. 387, § 12, eff July 1, 2006 (amending 12-60-3370); and 2006 Act No. 387, § 13, eff July 1, 2006 (amending 12-60-3380). Section 53 of 2006 Act 387 further provides:

This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling.

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March 28, 2013

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After listening to the testimony, weighing all of the evidence entered at the hearing, and taking into consideration all of the arguments presented at trial, I find that the Department's Determination in this matter must be sustained as fully explained below.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented and entered into evidence at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion by the parties, I make the following findings of fact by a preponderance of evidence:

1. Petitioner owns and operates Boggero's Portable Toilets in Greenwood, South Carolina as a sole proprietor. It is a family business, started and developed by her father. The Petitioner acquired the business from her father in 2005. The Petitioner has never applied for a retail sales tax license; collected sales or use tax from her customers, or remitted sales or use tax to the Department.

2. The Petitioner provides portable toilet installation, sinks, pick-up, and subsequent waste removal for temporary use. The Petitioner also provides holding tanks, trash containers, delivery, and servicing. In providing these portable toilets she also provides soap, toilet paper, towels, and other toiletries as her customers may request.

3. The Department calculated the Petitioner's gross proceeds (the taxable base for the imposition of the State sales and use tax) from the rental of portable toilets to be \$128,901.15 for the audit period. This figure was derived from total gross proceeds (\$429,670.49) minus gross proceeds from trash collection services (\$59,660.47)¹ minus out of state sales, multiplied by 30%.²

4. When a customer contacts the Petitioner and requests delivery of a portable unit, the Petitioner calculates the number of units that she believes the customer

¹ Trash removal in this case is not subject to sales tax. See, SCPLR 88-20 and 04-2.

² The South Carolina General Assembly enacted S. C. Code Ann. § 12-36-2120(62) (Supp. 2012), effective July 1, 2003, SB 274, 2003. This exemption excludes 70% of the gross proceeds from the rental of portable toilets from sales tax. Prior to the enactment of this exemption, 100% of the rental or lease of portable toilets and servicing attached to such rental were included in "gross proceeds" and subject to the sales tax. See S-D-115 (1977).

may need based on the number of individuals using the unit(s), her experience, and other guidelines.³

5. The Petitioner testified that she and the customer sign what she has entitled a "Service Agreement" (Agreement). This Agreement reflects the following terms, among others:

1. The customer requests delivery and use of portable toilet(s) and or dumpsters from Boggero's Portable Toilets.

2. The customer will be responsible for the following service payments:

of Portable Toilets _____ Cleaned # of Times per
Week _____
Price _____.

* * * *

4. From the date of this agreement, portable toilets and or dumpsters will be delivered for use by the customer upon request without the signing of another agreement. It is intended that this agreement will cover ongoing and future portable toilets and/or dumpsters deliver and use.

* * * *

6. The Customer understands that service fees for the use of portable toilets and or dumpsters may increase in the future, and the undersigned will be responsible for the increased payment without the signing of another agreement

* * * *

8. The equipment is the property of Boggero's Portable Toilet, and is provided to the customer for his exclusive use on the job site listed on delivery ticket or future delivery tickets.

9. The duration of the service period is determined from date of shipment on our part as indicated on this service agreement until date of pick up order.

³ During the audit period the Petitioner operated and maintained a website at www.boggerotoilet.com, for Boggero's Portable Toilets. This website provides a number of rental options for portable restrooms, including: VIP Units, Special Event Units, Wedding Units, Handicap Units, and Hand Washing Units (as noted specifically on taxpayer invoices submitted into evidence Bates Nos. 2 through 4449).

10. Carefully check equipment upon unloading a destination. All claims for shortages and damaged equipment must be noted on the delivery ticket.
11. The Customer agrees to be present when equipment is returned so that any shortages or damage or equipment will be noted on return report and acknowledged. It is expressly understood and agreed that the Customer shall pay for any parts which are lost or damaged beyond normal wear and tear.
12. Proper placing of the equipment on job location is the sole responsibility of customer with the assistance of Boggero's Portable Toilets. Access to toilets &.or dumpsters for servicing will be the Customers responsibility.
13. The Customer agrees to hold harmless Boggero's Portable Toilets for any and all damages to property and persons not caused by the negligence of Boggero's Portable Toilets while this equipment is being used under this service agreement or future delivery tickets.

6. The Department conducted a sales tax audit of the Petitioner for the audit period. After a review of the information provided by the Petitioner for the relevant periods, the auditor issued a Proposed Notice of Assessment imposing sales tax, penalties, and interest on the taxpayer's gross proceeds from the taxpayer's portable toilet business (tax: \$8,891.96; interest: \$602.27;⁴ penalty: \$3,191.36).

7. In response to the Petitioner's timely protest of the Proposed Assessment, the Department issued its Department Determination sustaining the imposition of the sales tax, penalties, and interest. Such is the basis of this contested case.

8. Department Auditor, Wes Butler, conducted the sales tax audit. He also prepared summaries of the invoices provided as follows:

1. Gross Sales Per Month From Invoices⁵

⁴ interest continues to accrue until the tax is paid or determined to be in error.

⁵ This summary indicates the calculation for determining the amount subject to the State sales and use tax by deducting from the total gross receipts, the total gross receipts for out of state sales, total gross receipts for trash collection services, and multiplying the tax base by 30% to account for the 70% exemption found in § 12-36-2120 (62).

2. Nontaxable Trash Sales⁶
3. Specific Invoice Analysis⁷

9. James McCutchen, Esquire, Revenue Law Advisor for the Department, co-authored the Department's 2012-2013 Sales and Use Tax Manual. This manual includes a summary of the South Carolina Sales and Use Tax Law (available in Chapter 36 of Title 12 of the South Carolina Code), South Carolina Regulations, Department Advisory Opinions, and practical examples for tax practitioners and taxpayers. Mr. McCutchen testified that it is the Department's longstanding administrative policy that charges for the rental of portable restrooms are subject to the State sales and use tax. He testified about a 1977 South Carolina Tax Commission Decision, Opinion No. S-D-115, in which the Commission found that charges for the rental of portable restrooms are subject to the State sales and use tax, notwithstanding the fact that such charges were also for the servicing of those portable restrooms. He testified that the Department has issued two Advisory Opinions (S.C. Rev. Rul. #09-5 and S.C. Rev. Proc. #1-5) in which the Department provided guidance to taxpayers and tax practitioners regarding the imposition of sales and use tax on charges for the use of portable restrooms. He further testified that these documents are available in hard copy upon request and also available at the Department's website. Although this website was not provided in the testimony, this Court notes that the Department's website is www.sctax.org.

ISSUES RAISED

1. Are the Petitioner's gross proceeds from the rental and servicing of portable toilets subject to sales tax?
2. If such gross proceeds are subject to the sales tax is the Petitioner liable for the failure to file and failure to pay penalties in addition to the sales tax?

⁶ See Fn. 1.

⁷ The Summary of "Specific Invoice Analysis" listed all invoices showing "new-delivery" specific unit(s) listed and, the charges for same. These charges comprised approximately 28% of the taxpayer's total gross proceeds for all periods at issue (after removing the charges for trash removal and out of state sales).

CONCLUSIONS OF LAW

Based upon the Findings of Fact as set forth above, I conclude the following as a matter of law:

A. Jurisdiction And The Burden Of Proof

1. This matter is properly before the Court pursuant to S.C. Code Ann. § 12-60-40 et. seq. (Supp. 2012), "General Appeal Procedures." A taxpayer may appeal a Department Determination by requesting a contested case hearing before the ALC, S.C. Code Ann. § 12-60-460 (Supp. 2012).

2. The burden of proof is on the party asserting the affirmative in an adjudicatory administrative proceeding. 2 Am. Jur. 2d Administrative Law, § 354 (2004). In the current matter, it is the Petitioner who has requested a contested case hearing to challenge the Department's imposition of sales tax, interest, and penalties on the gross proceeds from the taxpayer's business. Thus, the Petitioner asserts the affirmative and must prove that the Department's Determination is incorrect. Pursuant to S.C. Code Ann. § 12-36-950 (2000) the General Assembly statutorily provided that the Petitioner here bears the burden of proof. This statute provides:

**Presumption as to gross proceeds; burden of proof;
resale certificate.**

It is presumed that all gross proceeds are subject to the tax until the contrary is established. The burden of proof that the sale of tangible personal property is not a sale at retail is on the seller.

3. Here, the Petitioner has not carried that burden. South Carolina statutory law, case law, and the Department's longstanding administrative practice apply the "true object" test to determine "sales" including the mixture of sales of tangible personal property and services subject to the sales tax. I have determined that the true object of the transactions at issue is for the rental or lease of the tangible personal property – the portable toilets and other personal property provided. The General Assembly has provided for the imposition of a sales tax on the gross proceeds from such transactions by imposing the sales tax on 100% of gross proceeds. As to this particular business, the General Assembly enacted an exemption which excludes 70% of the gross proceeds from

the sales tax base. This results in the imposition of the sales tax on only 30% of the gross proceeds derived from the rental and servicing of the portable toilets, S.C. Code Ann. § 12-36-2120 (62) (Supp. 2009).

B. South Carolina Statutory Law Imposes a Sales Tax on the Gross Proceeds at Issue.

1. The Court's sole responsibility is to determine and give effect to the General Assembly's intent. As to the meaning and application of a statutory provision, recognizing and giving full effect to the General Assembly's intent is the Court's ultimate goal. Sonoco v. South Carolina Dep't of Revenue, 378 S.C. 285, 662 S.E.2d 599 (2008). A Court cannot apply nor construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993).

2. The Department and the Petitioner disagree over whether the "true object" of the transactions in question is for the rental or lease of tangible personal property or the performance of services. For several reasons I find that the true object is for the rental or lease of tangible personal property.

3. S.C. Code Ann. § 12-36-910 (Supp. 2009) provides for the imposition of a "sales tax on the gross proceeds of sales, . . . upon every person engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-60 (2000) provides for the definition of "tangible personal property" as "personal property which may be seen, weighed, measured, felt, touched or which is in any other manner perceptible to the senses."

4. Based upon the facts of this case, as further discussed below, I have determined that portable restrooms are tangible personal property. Further, S.C. Code Ann. § 12-36-70 (1)(c) (2000) provides that a "retailer" or "seller" includes a person operating or "renting, leasing, or otherwise furnishing tangible personal property for a consideration."

5. In this case the transactions in question include the rental or lease of tangible personal property and the provision of a service. Boggero provides portable toilets for use by its customers as well as other amenities but also services these units and

removes and disposes of waste. In such a case, South Carolina applies the “true object” test to determine whether or not the specific transaction(s) are “service” or a sale/rental of tangible personal property, see 27 S.C. Code Ann. Regs. 117-308.⁸

6. Here, the Petitioner is making a sale of both tangible personal property and service. S.C. Code Ann. § 12-36-100 (2000) defines “sale” as:

“Sale and purchase” mean any transfer, exchange, or barter conditional or otherwise, of tangible personal property for a consideration including:

- (1) a transaction in which possession of tangible personal property is transferred but the seller retains title as security for payment, including installment and credit sales;
- (2) a rental, lease, or other form of agreement;
- (3) a license to use or consume; and
- (4) a transfer of title or possession, or both.

7. Also here, the rental of the portable toilet and servicing are included in the sales tax base, “gross proceeds of sale.” S.C. Code Ann. § 12-36-90 (Supp. 2012) provides:

Gross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease, or rental of tangible personal property.

- (1) The term includes:

⁸ **Regulation 117-308. Professional, Personal, and Other Services.**

The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax, unless the sales and use tax is specifically imposed by statute on such services (i.e. accommodation services, communication services). The following subsections of this regulation will discuss various types of services. It should also be noted that several businesses, in addition to selling nontaxable services, also sell tangible personal property and should be licensed to report the tax.

This list is not all-inclusive as to services offered in South Carolina, as to services offered by a particular profession, or as to sales made by a particular profession.

* * * *

(b) the proceeds from the sale of tangible personal property without any deduction for:

- (i) the cost of goods sold
- (ii) the cost of materials, labor, or service;

* * * *

- (v) transportation costs;

* * * *

- (vi) any other expenses.

(Emphasis added).

The Court of Appeals, in interpreting the definition of “gross proceeds of sales” with respect to lay away fees paid in conjunction with lay away sales, held:

Section 12-35-30 [now Section 12-36-90] defines gross proceeds of sales as “the value proceeding or accruing from the sale of tangible personal property ... without any deduction for service costs.” But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds of sales and subject to the sales tax.

Meyers Arnold v. South Carolina Tax Commission,⁹ 285 S.C. 303, 328 S.E.2d. 920 (1985).

⁹ The Tax Commissioners, in Decision S-D-174, held a property damage waiver fee charged by a person engaged in the business of renting tangible personal property was subject to the sales tax. The Commission, in citing Meyers Arnold v. South Carolina Tax Commission, supra, stated:

Just as in Meyers Arnold, supra, the service fee here is taxable. But for the lease of the tangible personal property, the taxpayer would not have received the fee. The fee is obviously charged for the additional service of providing a lease of property free from liability for damage. In the absence of such service, the lessee, under the taxpayer’s lease agreements, would be “liable for any loss, theft, damage or destruction of leased property.” We find and conclude the fee for the property damage waiver is part of gross proceeds of sale subject to tax.

8. I further find the Petitioner's "gross proceeds" from the sale, rental/lease of portable toilets is subject to the sales tax based on the application of the "true object" test.

9. The "true object" test is best described in 9 Vanderbilt Law Review 231 (1956). It states:

The true test then is one of basic purpose of the buyer. When the product of the service is not of value to anyone other than the purchaser, either because of the confidential character of the product, or because it is prepared to fit the purchaser's special need - a contract or will prepared by a lawyer, or the accident investigation report prepared for an insurance company - this fact is evidence tending to show that the service is the real purpose of the contract. When the purpose of a contract is to produce an article which is the true object of the agreement, the final transfer of the product should be a sale, regardless of the fact that special skills and knowledge go into its production. Under this analysis, printing work, done on special order, and of significant value only to the particular customer, is still a sale. The purchaser is interested in the product of the services of the printer, not in the services per se. Similarly, it would seem that contracts for custom-produced articles, be they intrinsically valuable or not, should be classified as sales when the product of the contract is transferred.

The Vanderbilt Law Review article, in quoting Snite v Department of Revenue, 398 Ill. 41, 74 N.E.2d. 877 (1947), also establishes the following general rule:

If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering service, and not in the business of selling at retail. If the **article sold is the substance** of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail, and the tax which he pays...[is measured by the total cost of article and services]. If the service rendered in connection with an article does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the

business of selling at retail, and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax exempt as to the other.

(Emphasis added.)

10. This test has been applied by the South Carolina Supreme Court. Fraternal Order of Police v. South Carolina Dept. of Revenue, 352 S.C. 420, 574 S.E.2d 717 (2002) (“According to the ‘true object test’ sales which are merely incidental to the transaction and not its true object are not exempt from the retail sales tax. See *Journal of Multistate Taxation*, Vol. 5, No. 6, pp. 244-253 (Jan./Feb. 1996.”). In that case, the Court found that if the refund issue had been preserved, applying the “true object” test, as between the retailer of the cards and the operation, the sale of the bingo cards were merely incidental to the transaction, the wager. Contrarily here, the customer pays for the “unit,” the four walls, floor, roof, facilities and other amenities provided for their use through the Petitioner’s business. The customer purchases the privacy of the unit. Without this unit there would be no need for service. Thus the service is merely incidental to the transaction – the lease or use of the unit.

11. The Petitioner’s argument that her entitled “Service Agreement” is devoid of the term “rental” and as such the imposition of the sales tax in this case must fail is unavailing. The characterization of the transaction through mere nomenclature cannot be controlling as to whether there is a retail sale of tangible personal property. Rather, the application of the “true object” test leads this Court to one conclusion – the customer pays the Petitioner for the use and possession of the portable toilet unit – for privacy, the four walls, the floor, and the facilities. The use is temporary as referenced in the Agreement - the customer calls to have the unit(s) picked up. Notably, at the time of discovery in this case, all units for the periods at issue had been picked up. Rather, as noted in Regulation 117-308¹⁰ and S.C. Rev. Rul. #09-5 the “true object” test is determinative.

12. The Department has consistently applied the “true object test” in this manner and I find no cogent reasons to depart from such application. Where an

¹⁰ See Fn. 8.

administrative agency has consistently applied a statute in a particular manner, we cannot overturn the agency's construction absent a cogent reason. Gilstrap v. South Carolina Budget & Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992). Greystone Catering, Inc. v. S.C. Dep't of Revenue, 326 S.C. 551, 486 S.E.2d 7 (Ct. App. 1997). Historically, as early as 1977 the South Carolina Tax Commission imposed the sales tax on 100% of the "gross proceeds" from the use of portable toilets. Tax Commission Decision S-D-115 specifically imposed the sales tax as follows "[w]e are satisfied that the charging of placing a portable toilet is a rental charge that is taxable under the provisions of the Sales and Use Tax Act." This position has been consistently applied by the Department, see S.C. Rev. Proc. #01-5, until the General Assembly enacted § 12-36-2120 (62) to exempt 70% of the gross proceeds from the rental of portable toilets in 2003 from the imposition of the sales tax.

13. This Court also finds persuasive and adopts the view of the Virginia Supreme Court as provided in LMZ Inc. v. Virginia Dept. of Taxation, 606 S.E.2d 797 (January 14, 2005) where a similar issue regarding sales tax on portable toilet service and rental was addressed. The court found:

The true object test is the means by which the Department determines the dominant purpose of a mixed sales and service transaction in order to determine whether the transaction is subject to sales tax as a sale of tangible personal property or whether it is a sale of services and therefore exempt from tax. The true object test was adopted by this Court in WTAR, 217 Va. at 883, 234 S.E.2d at 249, in which we acknowledged the endorsement of the test by a preponderance of authorities.

* * * *

As we also noted in WTAR, the taxpayer's "manner of computing the invoice" is not determinative of either the true object of the transaction or whether the service provided is truly separate and distinct from the property leased. 217 Va. at 884, 234 S.E.2d at 249. Otherwise, a taxpayer could create its own tax exemption merely by altering the printing of its invoices.^[11]

¹¹ Other jurisdictions have similarly found but based on the application of a different test; see, In the Matter of Waste Mgt. of NY v. T0061 Tribunal of the State of NY et. al, 185 A.2d 479, 585 NYS2d 883 (NY Sup. Ct, 7/16/1992), similar business receipts subject to

14. Petitioner argues that its provision of portable toilets is akin to a business that provides containers for the removal of trash and their removal. The Petitioner further argues that the Department does not impose a sales tax on that business, and accordingly, should not impose such a tax on the removal of "human waste." However, such is not the case. A similar argument was raised in the case of Ed Robinson v. S.C. Tax Comm., 356 S.C. 120, 588 S.E.2d 97 (2003). In that case, Mr. Robinson argued that imposing sales tax on his laundry gross proceeds was unconstitutional because other service businesses are not taxed.

The Court stated:

The State's rational basis for treating dry cleaners differently from other trades in the service industry is to promote the legitimate governmental interests of fostering economic development in a particular segment of the economy. The Legislature achieves this goal by exempting dry cleaners from paying sales taxes on expensive machinery necessary to start the business in exchange for allowing the payment of sales taxes based on later-earned receipts.

Here, the General Assembly has taxed only a portion of the "gross proceeds"

sales tax; Weiss v. Best Enterprises Inc., 917 SW2d 543 (3/18/96) ("The transactions [lease/rental of portable toilets] were the type of mixed transactions that are fully taxable"); Broomer and Thomas Constr. Co. Inc. v. Dir. Revenue, RS-81-0068 (8/26/1982); Administrative finding that use tax was due on the rental and servicing of portable toilets (taxpayer located in Missouri); In the Matter of Proposed Assessment of Sales and Use Tax for the Period May 1, 2000 through March 31, 2003 by Sec. of Rev. of NC. v. Taxpayer, 2003-41 (2/25/2004) finding:

While the Taxpayer's activity does include the service, or "cleaning" by emptying of waste from the toilet holding tanks, waste removal is not the essence of the transactions in question. The toilet units are more than receptacles. They are enclosures designed for the comfort and privacy of the user. What the customer contracts for is the facility itself and not mere waste removal. The removal of the waste, like the provision of chemicals and toilet paper, is simply routine maintenance necessary to render the toilets usable.

generated from the rental of the portable toilets, a mere 30% (§ 12-36-2120 (62)) - a percentage borne out by the Petitioner's records in this case. That is, the Petitioner's invoices show that the toilets, sinks, etc., rented by the taxpayer comprise approximately 28% to 30% of the gross proceeds reflected on all invoices provided for the periods at issue, January 1, 2009 through December 31, 2011.

15. Moreover, in this case the South Carolina General Assembly has specifically spoken to the taxability of the portable toilet business at issue. Section 12-36-2120(62) provides a SPECIFIC exemption for gross proceeds derived from the rental or lease of portable toilets. This provision states:

12-36-2120. Exemptions from sales tax.

Exempted from the taxes imposed by this chapter are the gross proceeds of sales, or sales price of:

(62) seventy percent of the gross proceeds of the rental or lease of portable toilets.

(Emphasis added).

This statutory change in 2003 (see footnote #2) underscores the intent of the legislature and the Petitioner cannot escape that intent by adroit draftsmanship.

16. Here, as required by the General Assembly, first, the auditor calculated the total gross proceeds from the rental of the portable toilets to include all servicing charges (§ 12-36-90 (1)((b)(i) and (ii)). The auditor then reduced this amount by 70% to recognize the statutory exemption granted by the Legislature.¹² It is interesting to note that here, based on the Petitioner's invoices for the periods at issue, the provision of the units for the customers use, rental, comprises approximately 28% of the Petitioner's total gross proceeds almost the exact amount statutorily subject to tax after giving effect to the exemption. Here too, the Department has consistently applied the exemption at § 12-36-2120(62). As S.C. Rev. Rul. #09-5 provides:

Based on the above, businesses temporarily providing portable toilets to others for a fee are renting tangible

¹² S.C. Rev. Rul. #09-5 provides that first the total rental to include servicing costs are calculated to which the 70% exemption is applied to arrive at the sales tax base for the imposition of the sales tax.

personal property since such constitutes the transfer of tangible personal property for a consideration. See Code Section 12-36-60. In addition, the "true object" of the transaction is the portable toilet and not the servicing of the toilet (regular and routine removal and disposal of the waste and the replacement of chemicals and toilet paper). Such servicing is incidental to the rental of the portable toilets.

Other states have reviewed this issue. North Carolina (Sales and Use Tax Bulletin 34-17) and Virginia (Ruling of the Tax Commissioner 91-275) both consider the business of providing portable toilets for a limited period of time for a fee a rental of tangible personal property subject to the sales and use tax.

C. The Failure to File and Failure to Pay Penalty.

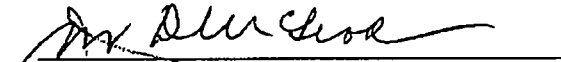
I find that the Department's imposition of the Failure to File and pay penalties is appropriate in this case. The Petitioner has never filed sales tax returns nor collected and remitted sales tax as required by law as thoroughly discussed above. Accordingly, pursuant to S.C. Code Ann. § 12-54-43(B)(C), and (D) (Supp. 2012), such penalties must be imposed.

ORDER

Based on the above Findings of Fact and Conclusions of Law, in this case, the Court must impose the sales tax, penalties, and interest as provided in the Department's Determination, on the taxpayer's gross proceeds from her portable toilet business and ORDER the taxpayer to remit the same to the Department within thirty days of receipt of this Court's ORDER.

IT IS SO ORDERED.

January 6, 2014
Columbia, S.C.

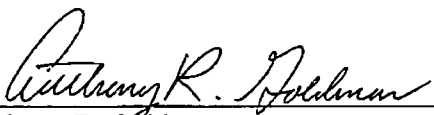


John D. McLeod, Judge
S.C. Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

January 6, 2014
Columbia, S.C.



Anthony R. Goldman
Judicial Law Clerk

ATTACHMENT B

McDONALD PATRICK POSTON HEMPHILL & ROPER, LLC
ATTORNEYS AND COUNSELORS AT LAW
414 MAIN STREET
GREENWOOD, S. C. 29646

KENNETH W. POSTON
ROY R. HEMPHILL
W. LEE ROPER, II
STEVEN M. PRUITT
DOUGLAS L. BELL
HANNAH K. METTS

NANCY T. HOBBS*
*Also admitted in NC

February 27, 2014

WILLIAM B. PATRICK, JR.
OF COUNSEL
JAMES E. McDONALD
RETIRED

MAILING ADDRESS
P. O. BOX 1547
GREENWOOD, S. C. 29648

TELEPHONE
(864) 229-2511 ext. 7
FACSIMILE
(864) 229-5327
E-MAIL
hmetts@mcdonaldpatrick.com

VIA UPS OVERNIGHT DELIVERY

Anne Marie Thompson, Esquire
South Carolina Department of Revenue
300A Outlet Pointe Boulevard
Columbia, SC 29210

Re: Boggero's Portable Toilets v. S.C. Department of Revenue
Appellate Case No. 2014-000214

Dear Ms. Thompson:

In accordance with the South Carolina Revenue Procedures Act, enclosed please find a check in the amount of \$8,891.96 for the sales tax determined to be owed to the Department of Revenue by the Administrative Law Court in the above matter.

Please let me know if you have any questions regarding this matter.

Sincerely yours,

McDONALD PATRICK POSTON HEMPHILL & ROPER, LLC

Hannah K. Metts

BOGGERO'S PORTABLE TOILET		3306
1502 SOUTH MAIN ST 864-223-7023		87-118/532
P O BOX 783		91
GREENWOOD SC 29646		DATE <u>February 27, 2014</u>
PAY TO THE ORDER OF	<u>S.C. Department of Revenue</u>	\$ <u>8,891.96</u>
<u>eight thousand eight hundred ninety-one and 96/100</u>		DOLLARS. <input type="checkbox"/>
The Palmetto Bank Upstate South Carolina 1-800-PAL BANK		000024
FOR <u>sales tax pending appeal</u>		<u>Henry Boggero</u>
⑈003306⑈ ⑆053201186⑆ 011109270⑈		



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ATTACHMENT C

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must be 8.00 or less
pounds, including the weight
of those listed on the
label.
International Shipments
The UPS Express Mail
Flat Rate Box is available
for certain international
shipments. For more
information, visit
ups.com/international
Note: Express Envelopes
containing sensitive
information are not
eligible for cash equivalent.

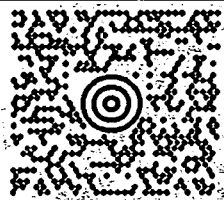
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414 MAIN STREET
GREENWOOD SC 29646

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SHIP TO:
ANNE MARIE THOMPSON, ESQUIRE
SC DEPARTMENT OF REVENUE
300A OUTLET POINTE BOULEVARD
COLUMBIA SC 29210-5658



SC 292 9-02



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BILLING: P/P

Reference#1: HKM - Boggero's Appeal
Reference#2: 14-00013

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SC DEPARTMENT OF REVENUE
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STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod
Administrative Law Judge

Case No. 13-ALJ-17-0218-CC
Tracking No.: 2014-000214

Eugenia Boggero, d/b/a Boggero's Portable Toilets,.....Appellant,

v.

South Carolina Department of Revenue,.....Respondent.

**AFFIDAVIT OF JEAN M. O'CONNOR REGARDING RESPONDENT'S
MOTION TO DISMISS WITH PREJUDICE**

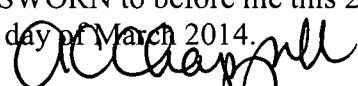
COMES NOW Jean O'Connor, Administrative Manager at the South Carolina
Department of Revenue and being duly sworn provides:

1. I am an employee of the South Carolina Department of Revenue;
2. Appellant filed Notice of Appeal with this Court on February 4, 2014;
3. Appellant paid the tax ordered by the Administrative Law Court in this matter to the Department on February 27, 2014. (See Attachments A and B)

FURTHER AFFIANT SAYETH NOT.


Jean M. O'Connor

SWORN to before me this 28th
day of March 2014.


Notary Public for State of South Carolina
My commission expires: 0/22/2022

000026

ATTACHMENT A

McDONALD PATRICK POSTON HEMPHILL & ROPER, LLC
ATTORNEYS AND COUNSELORS AT LAW
414 MAIN STREET
GREENWOOD, S. C. 29646

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NANCY T. HOBBS*
*Also admitted in NC

February 27, 2014

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OF COUNSEL
JAMES E. McDONALD
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VIA UPS OVERNIGHT DELIVERY

Anne Marie Thompson, Esquire
South Carolina Department of Revenue
300A Outlet Pointe Boulevard
Columbia, SC 29210

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Sincerely yours,

McDONALD PATRICK POSTON HEMPHILL & ROPER, LLC

Hannah K. Metts

BOGGERO'S PORTABLE TOILET

1502 SOUTH MAIN ST. 864-223-7023
P. O. BOX 783
GREENWOOD SC 29646

3306

67-118/532
91

DATE February 27, 2014

PAY TO THE ORDER OF S.C. Department of Revenue \$ 8,891.96

eight thousand eight hundred ninety one and 96/100

DOLLARS

The Palmetto Bank

Upstate South Carolina
1-800-PAL BANK

000027

FOR sales tax pending appeal

⑈003306⑈ ⑆053201186⑆ 011109270⑈



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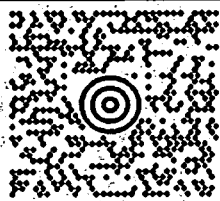
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containing sensitive pe
or cash equivalent

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SC DEPARTMENT OF REVENUE
300A OUTLET POINTE BOULEVARD
COLUMBIA SC 29210-5658



SC 292 9-02



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BILLING: P/P
Reference#1: HKM - Boggero's Appeal
Reference#2: 14-00013
US 16.1.04. WNTNV50 48.0A 01/2014



SC DEPARTMENT OF REVENUE
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STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod
Administrative Law Judge

Case No. 13-ALJ-17-0218-CC
Tracking No.: 2014-000214

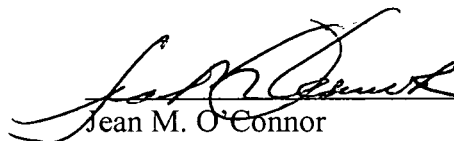
Eugenia Boggero, d/b/a Boggero's Portable Toilets,.....Appellant,

v.

South Carolina Department of Revenue,.....Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Motion to Dismiss, Memorandum in Support of Motion to Dismiss, and Affidavit of Jean M. O'Connor on Eugenia Boggero, d/b/a Boggero's Portable Toilets, by depositing a copy of it in the United States Mail, postage prepaid, on March 28, 2014, addressed to her attorneys of record, Roy R. Hemphill, Esquire and Hannah K. Metts, Esquire, McDonald Patrick Poston Hemphill & Roper, LLC, P.O. Box 1547, Greenwood, S.C. 29648 and Burnet R. Maybank, III, Nexsen Pruet LLC, P.O. Drawer 2426, Columbia, S.C. 29202, on March 28, 2014.


Jean M. O'Connor

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MAR 31 2014
SC Court of Appeals



State of South Carolina
 Department of Revenue
 301 Gervais Street
 P.O. Box 125
 Columbia, South Carolina, 29214

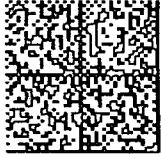
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